



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2004

Ms. Fancy H. Jezek
Holbrook & Jezek
Attorneys and Counselors at Law
P.O. Box 2548
Harker Heights, Texas 76548-2548

OR2004-9759

Dear Ms. Jezek:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213229.

The Killeen Independent School District (the "district"), which you represent, received a request for information related to the resignation of a district employee. You state that the district will provide some information to the requestor. You assert that some of the responsive records, to the extent they exist, are not subject to the Act. You claim that the remaining requested information is excepted from disclosure under sections 551.104, 552.101, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹

Initially, we address your argument that a portion of the information requested, specifically information responsive to the request for "any and all notes concerning [the district employee's] resignation taken by administrators and board members in attendance at the Aug. 24 board meeting," is not subject to the Act. Chapter 552 is only applicable to public

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information. *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002. You state that the notes at issue, to the extent they exist, were created by the individual board members or administrators and are maintained by these individuals in their sole possession for their individual use. In support of your position, you cite to Open Records Decision No. 77 (1975) where we concluded that personal notes made by individual faculty members for their own use as memory aids were not subject to the Act. We note that since issuing Open Records Decision No. 77, this office has issued numerous rulings concluding that information collected, assembled, or maintained in connection with the transaction of official business, including "personal" notes, is subject to the Act. *See e.g.*, Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 327 (1982) (notes made by school principal and athletic director relating to teacher "were made in their capacities as supervisors of the employee" and constitute public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to predecessor of Act).

The notes at issue, to the extent they exist, relate to the resignation of a district employee. Thus, the information was created as part of the district's official transaction of business. Furthermore, the Act's definition of "public information" is not dependent on considerations such as whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995). Accordingly, we find that the notes are subject to the Act and may only be withheld from disclosure if an exception under the Act applies. Because you have raised no other exceptions to disclosure, nor have you submitted any information responsive to this portion of the request for our review, the district must release this information to the extent it exists. *See* Gov't Code § 552.301, .302.

You assert that the certified agenda of an August 24, 2004 executive session meeting of the district's board is made confidential by law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" *Id.* § 551.104(c) (emphasis added.). Thus, such information cannot be released to a member of the public in response to an open records request. *See also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions

to determine whether governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). We therefore agree that the certified agenda of the executive session meeting at issue is confidential and must be withheld from disclosure under sections 552.101 and 551.104(c) of the Government Code.

Next, we address your assertion that the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the submitted information consists of communications between an identified attorney for the district and her clients that were not intended to be disclosed to third parties and that were made in the furtherance of the rendition of professional legal services. Based on this representation and our review of the submitted information, we conclude that the

information consists of privileged attorney-client communications that are excepted from release under section 552.107.

In summary, to the extent that they exist, the district must release the notes taken by administrators and board members in attendance at the executive session meeting at issue. The certified agenda of the executive session meeting is confidential and must be withheld from disclosure under sections 552.101 and 551.104(c) of the Government Code. The submitted information you have marked accordingly may be withheld under section 552.107.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

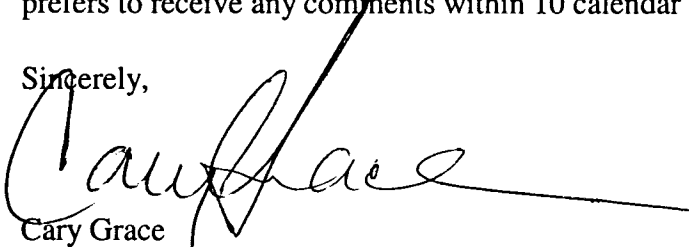
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 213229

Enc. Submitted documents

c: Ms. Wendy Gragg
Killeen Daily Herald
P.O. Box 1300
Killeen, Texas 76540
(w/o enclosures)